Supreme Court, U.S.
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No. 95-2094

In The

Supreme Court of the United States

October Term, 1995

DEAN WITTER REYNOLDS INC.,
a corporation,

Petitioner,

v.

HUDSON T. HARRISON and HARRISON CONSTRUCTION INCORPORATED, a corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a broker-dealer is liable as a control person under Section 20(a) of the Securities Exchange Act of 1934 (the "Act") for fraudulent acts committed by controlled persons where a jury has found plaintiff reasonably relied on what proved to be false representations made by the controlled persons that plaintiff's investment funds were being applied to purchase municipal bonds through the defendant broker-dealer.

II. Whether the degree of reliance required for a violation by the controlled persons of Section 10(b) of the Act was properly found by the jury to have been proved, where the evidence showed *inter alia* that the broker-dealer had made and maintained a fraud perpetrator as a vice president, had provided the fraud perpetrators with business cards, an office in the broker-dealer's branch office, and telephone service which was frequently used by plaintiff to discuss the municipal bond investments proposed by the controlled persons, and provided data bases on municipal bonds enabling the controlled persons to plausibly identify the securities in which plaintiff believed it was investing.

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STATUTES:

Securities Exchange Act of 1934, 15 U.S.C. §78a-78jj;

Section 20(a), 15 U.S.C. §78t(a) ..... *passim*

Section 10(b), 15 U.S.C. §78j(b) ..... *passim*

REGULATION:

SEC Rule 10b-5, 17 CFR §240.10b-5 ..... *passim*

REASONS FOR DENYING THE WRIT

There is nothing presented by this petition that makes this case appropriate for review. *First*, there is no federal law question raised on which any conflict has developed between federal circuits or with any governing Supreme Court precedent. In fact, the opinion below is consistent with all controlling precedent. This Court denied certiorari in 1993 when essentially the same arguments were made in behalf of the same defendant, and before the Section 20(a) claim was tried below. *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873 (7th Cir. 1992) (App. 59-87), *cert. denied*, 509 U.S. 904 (1993) (*"Harrison I"*). *Second*, there is no claim of any departure from the accepted and usual course of judicial proceedings. *Third*, nothing in the Petition calls for an exercise of the Supreme Court's supervisory power. *Fourth*, the novel and complex factual circumstances of this case make it inappropriate for review because any decision based thereon would lack general application. This case simply does not present any issues of general public concern.

STATEMENT OF THE CASE

This case involves a jury verdict, and judgment based thereon, finding Dean Witter Reynolds, Inc. ("Dean Witter") liable under Section 20(a) of the Securities Exchange Act of 1934 as a "control person" for injuries to plaintiffs caused directly by securities fraud perpetrated by two "controlled persons" employed by Dean Witter, one as a vice president and the other as a registered salesperson, from 1983 to 1986.

Plaintiffs, Hudson T. Harrison and his corporation, Harrison Construction Incorporated ("Plaintiffs"), were two of more than 100 victims of a Ponzi scheme launched in 1983 by Dean Witter Vice President John Kenning, and conducted with the help of his young partner, registered salesperson John Carpenter. (App. 3-4, 8-9).[1] This fraudulent scheme was carried on from a Dean Witter securities brokerage office in the Boca Raton, Florida area for over 30 months without being detected by Dean Witter. (App. 9). During that period Kenning and Carpenter took in $7.5 million from all fraud victims, each of whom believed the fraud perpetrators' statements that investors' money was being invested in municipal bonds through Dean Witter's bond traders. Kenning and Carpenter made the investment seem like a program that retained the relative safety and tax benefits of municipal bonds but offered a higher rate of return for the select group of individuals chosen by Kenning and Carpenter to receive this special benefit available only through them. (App. 4-6, 19). Plaintiffs were late recruits, not having been shown the fictitious municipal bond program until February 1985, after it had been operating for at least 14 months. (App. 7).

In fact, no municipal bonds had been or ever were purchased. (App. 5). The undisclosed purpose of the Ponzi scheme was to secure from public investors cash to be invested in John Carpenter's options account at Dean

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[1] Citations to Record: References to the Witter petition for certiorari are (P. ___), to the petition's appendices (App. ___), and to Plantiffs' Appellees' Supplemental Appendix in the Seventh Circuit (Supp. ___).

Witter. (App. 5). Cash so obtained was applied to buy, through Dean Witter, more than 97,000 options contracts in Carpenter's options account. (Supp. 138). About 40% of all the cash the controlled persons received from Plaintiffs and others was recirculated through the Ponzi scheme. (App. 8).

More than $3 million so obtained was paid to Dean Witter as deposits in that options account, carried by Dean Witter in Carpenter's name only. (Supp. 190-198). Carpenter (then 25 years old) had opened this trading account only days after being hired, at which time he certified to Dean Witter that he had a liquid net worth of $25,000. (Supp. 123). The net loss ultimately incurred in the Carpenter-Dean Witter account was just under $2.0 million (App. 6), each loss being fully paid to Dean Witter as incurred with funds fraudulently obtained from Plaintiffs and others, and every transaction being recorded on Dean Witter's own statements. (Supp. 138). From 1983 to July 1986, Dean Witter grossed more than $400,000 in commissions and other charges on the Carpenter-account options trading. (App. 6).

Plaintiff, Hudson T. Harrison, was introduced to the controlled persons after the scheme had been operating for more than a year. He too was impressed by the recognition Dean Witter had given Kenning (he was a Vice President), by the Dean Witter branch office he was shown by Kenning and Carpenter (Supp. 69), and he believed that the municipal bond program they described was – as Kenning claimed – a program Dean Witter had instituted for its top sales producers in municipal bonds. (Supp. 70). As presented by Kenning, his position as a

Dean Witter vice president, coupled with the Kenning-Carpenter partnership being among Dean Witter's largest producers, caused Dean Witter to allow them to buy municipal bonds at advantageous prices through a special investment program offered by the broker-dealer to its large producers. (App. 4). In this investment program, the company sometimes showed them blocks of bonds too large for Kenning and Carpenter alone to buy. In those instances, Dean Witter permitted them to acquire the balance of funds needed from other sources, i.e. from special customers. (App. 5). It was their practice, Kenning said, to pay these investors the pro rata gains realized when the bonds paid off, making for themselves only a small amount of profit on investors' money. (Supp. 73). This was the same picture he had painted for more than 100 investors in the year-plus before he met Harrison. Harrison believed him, just as so many investors before him had.

The first investment by Harrison was on March 1, 1985. (Supp. 74). At that date, Dean Witter's account statements for John Carpenter's options account would have disclosed to any Dean Witter supervisor who studied them that Carpenter's accumulated realized net losses – all paid for in cash – were about $800,000. (App. 7). Harrison had no access to any such information.

Over the next 16 months, Plaintiffs made investments in municipal bonds on 21 occasions. (Supp. 239-240). Virtually all of these investments began by Kenning calling from Dean Witter's office and presenting to Harrison the bond issue being purchased, including the municipality issuing it, its coupon and the amount required in order for Harrison to participate. (App. 8; Supp. 73-74).

Seldom did Harrison commit on the first call; his practice was to call back to Dean Witter's office for further information and decide then whether to invest in the specific opportunity. (Supp. 75-76). He had numerous communications with Dean Witter in that Harrison called Kenning or Carpenter 40 to 50 times at Dean Witter's office, heard the secretary or operator answer "Dean Witter", followed by one of the two controlled persons coming on the line. (App. 8).

Dean Witter management at any level could easily discover that Carpenter generated virtually no customer-related business at Dean Witter. (App. 6). More than 90% of his compensation from Dean Witter was generated from fees Dean Witter charged him based on options trading in the Carpenter account; in nearly three years Carpenter opened no more than five small accounts (other than his own) and grossed $71,000 in commissions. (App. 6). In April 1984, eleven months before Harrison's first investment, Carpenter paid for $98,000 in losses with bad checks. (App. 14-15). It was at that time, and for that reason only, that his branch manager required same-day payment for any option contracts purchased. (App. 7). Management's indifference to the source of these funds was nearly total. (App. 13-15). Instead of making effective inquiry about where a young man in his 20s with virtually no known income and declared minimum net worth was acquiring the funds being paid into Dean Witter almost daily, Dean Witter sent Kenning and Carpenter letters of commendation and presented them with a plaque. (App. 6). The Carpenter account commissions were a significant source of gross income for both the branch manager and Dean Witter. (App. 13-14).

Harrison meanwhile was receiving assurances from the controlled persons that the program was operating as promised, and was accepting Kenning's invitations to reinvest proceeds from maturing bond investments into new similar investments. Sometimes, as the non-existent bonds were believed by Harrison to mature, Harrison asked for payment of individual transaction proceeds, and shortly after such requests received an aggregate of less than $900,000 in such classic Ponzi scheme payments. (Supp. 241).

Incredibly, the Ponzi scheme ran for over thirty months in and around Dean Witter's branch office without being detected by Dean Witter. (App. 8-9). In July 1986, Kenning and Carpenter finally gave up. They went to the U.S. Attorney, described the scheme they had been operating in Dean Witter's office, pleaded guilty, and each was sentenced to serve time in federal prisons for securities fraud. (App. 4).

Plaintiffs brought suit to recover losses in October 1986. After a district judge entered summary judgment against plaintiffs, the Seventh Circuit Court of Appeals reversed on the count alleging liability under Section 20(a) of the Securities Exchange Act of 1934. *Harrison I* (App. 59-87), *cert. denied*, 509 U.S. 904 (1993). The Seventh Circuit held there were issues of fact as to whether Dean Witter was a "control person" (App. 73) and, if it was, whether it could prove the "good faith" defense provided in the statute. (App. 74). The Section 20(a) claim alone was tried to a jury in September 1994, and a verdict was rendered in favor of plaintiffs for the full amount of their losses. The district court subsequently added pre-judgment interest to the award. (App. 4, 48-52).

I. SECTION 20(a) STANDARDS OF LIABILITY ARE CLEAR. *HARRISON II* HAS NOT EXPANDED THE SCOPE OF SECTION 20(a).

The jury applied standards for determining broker-dealer liability, based on Section 20(a), which are functionally identical in every federal circuit. The jury was instructed that plaintiffs had the burden of proving the control relationship existed, applying the "control person" standards articulated in *Harrison I* on which this Court *denied* certiorari. To sustain that burden, plaintiffs were required to show:

> (1) the alleged control-person (Dean Witter) actually exercised control over the operations of the violators (Kenning and Carpenter) generally, and
>
> (2) the control-person possessed the power or ability to control the specific activity upon which the primary violation was predicated, whether or not that power was exercised. (App. 11-12).

Dean Witter made no objection to the "control person" instructions as given to the jury, and as expressed in *Harrison I*. (App. 10-11). Abundant evidence was presented to support the jury determination that both elements had been established. The "control" standard applied below has been expressly adopted by the Seventh Circuit (*Harrison I* at pp. 880-81; *Donohoe v. Consolidated Operating & Production Corp.*, 982 F.2d 1130, 1138 (7th Cir.

1992)) and by all other federal circuits considering the elements of Section 20(a) "control".[2]

In *Harrison I,* the Seventh Circuit ruled that disposing of common law theories of liability based on respondeat superior did not settle the issue of control person liability under Section 20(a). *Harrison I,* at 974 F.2d 873, 881. (App. 73). It demonstrates the appeals court's recognition that proof of the elements necessary to establish apparent authority under the law of agency differ from proof of reasonable reliance on the representations of controlled persons required by Section 10(b). Such recognition is consistent with virtually every opinion that has considered the effect of the language and legislative history of Section 20(a). The courts of appeals have correctly concluded Congress intended to supplement the common law theory of respondeat superior as a basis for vicarious liability in securities cases. *Hollinger v. Titan Capital Corp.,* 914 F.2d 1564, 1576-77 (9th Cir. 1991) (en banc), *cert. denied,* 499 U.S. 976 (1991). The *Hollinger* court wrote, "Only if **both** respondeat superior and Section 20(a) are available is the statutory scheme comprehensive and the public protected by the federal securities laws." (At 1577).

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[2] *Metge v. Baehler,* 762 F.2d 621, 631 (8th Cir. 1985), *cert. denied,* 474 U.S. 1057, 474 U.S. 1072 (1986); *Abbott v. Equity Group, Inc.,* 2 F.3d 613, 619-20 (5th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1219 (1994); *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.,* 973 F.2d 474, 486 (6th Cir. 1992), *cert. denied,* 506 U.S. 1079, (1993); *First Interstate Bank v. Pring,* 969 F.2d 891, 898 (10th Cir. 1992), rev'd on other grounds sub nom. *Central Bank v. First Interstate Bank,* ___ U.S. ___, 114 S.Ct. 1439 (1994); cf. *Brown v. Enstar Group, Inc.,* 84 F.3d 393, 396 (11th Cir. 1996).

The Petition's contrary assertion is unsupported by either authority or logic. (P. 11). It is plain that the securities laws' "controlling person" provisions were enacted to expand, rather than restrict, the scope of liability under the common law. *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 812 (2d Cir. 1975). After an extensive review of the Act's legislative history, the Fifth Circuit held the Securities Exchange Act expressly made the rights and liabilities imposed by the Act cumulative of any existing at law or in equity. *Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1118 (5th Cir. 1980). The duty imposed on broker-dealers by Section 20(a).

> " . . . is imposed to protect the investing public and make brokers aware of the special responsibility they owe to their customers."

Rochez Brothers, Inc. v. Rhoades, 527 F.2d 880, 886 (3d Cir. 1975); cf. *Monieson v. CFTC*, 996 F.2d 852, 859 (7th Cir. 1993).

Congress clearly intended to impose on control persons, especially those controlling broker-dealer operations, a high standard of oversight and supervision to prevent injuries being inflicted on public investors by persons under the control of broker-dealer management. The statute provides, as applied to this situation, that the broker-dealer will be responsible to injured persons for securities fraud perpetrated by controlled persons, unless the broker-dealer can sustain the burden of proving that it acted in good faith and did not directly or indirectly induce the act or acts constituting the fraud. Here the jury clearly and correctly held Dean Witter had failed to sustain its burden of proving the "good faith" defense. The

Petition to this Court does not challenge the jury's verdict in that respect.

At no point has the Seventh Circuit, or any court of appeals, held or suggested that purely personal transactions by a controlled person satisfy the "control" requirement of Section 20(a), as Dean Witter's Petition asserts. Every court has recognized that securities fraud perpetrated by controlled persons is the principal violation for which Section 20(a) provides an express remedy. Courts and the SEC have correctly recognized that broad remedial construction of the statute, including the elements of "control", is required for Section 20(a) to achieve its purpose. *Harrison I*, 974 F.2d at 876-877. (App. 66). Such construction was required, and is required, because, "The amount of securities fraud litigation appearing in the courts . . . should be at least sufficient to encourage a continuous high standard of caution by broker-dealers to protect themselves and their clients from the machinations of their own unscrupulous employees." *Harrison II* at p. 616. (App. 16).

The requisite relation of "control" exists if the plaintiff proves defendant had control over the operations of the violator generally, and the power or ability to control the specific activity upon which the primary violation was predicated, **whether or not that power was exercised**. (App. 11-12). Dean Witter does not, and cannot, dispute its general control on these facts. Prodigious proof was presented of the almost immediate transfer of funds obtained by Kenning and Carpenter from Harrison and others into Carpenter's Dean Witter options account. That Dean Witter had the power or ability to control the activity, which depended upon payment with those funds

for 97,000 put options contracts, is undeniable. It was certainly ample for the jury to find Dean Witter had, and failed to exercise, the power to have controlled the Kenning-Carpenter activity. "There is sufficient basis . . . for a reasonable jury to conclude that . . . there was a total lack of sufficient diligence, that the supervision was only very casual or grossly indifferent, and that Dean Witter totally ignored the obvious warning signs." (App. 13).

Some, though far less than all, of that proof is discussed in the Seventh Circuit's opinion. (App. 12-17). Every trade in Carpenter's account was recorded on Dean Witter's internal reports. Dean Witter's own rules forbade "aggressive trading" by employees; its own Director of Compliance agreed that its reports showed Carpenter's trading violated the "aggressive trading" standard, but no one attempted to slow it down. (App. 15). One compliance officer acknowledged he had never seen trading as aggressive as that reported by Carpenter in **any account.** (App. 15). The internal rules required close review of employee transactions to be sure the employee was not trading excessively, or beyond his financial circumstances. Carpenter's trading was the most aggressive in the Dean Witter branch virtually every month. His losses paid to Dean Witter exceeded his liquid net worth by 20 times before Harrison made his first investment, yet no review of Carpenter's trading was ever conducted (App. 15), nor did anyone ask where he was obtaining the funds. In April 1984, checks Carpenter delivered to Dean Witter to cover payment for $96,000 in options losses were returned NSF. His branch manager demanded that all option purchases thereafter be paid for with "good

funds", but no one asked where their employee with minimal known resources acquired $96,000 to make good those NSF checks. (App. 14-15). Dean Witter had the unquestioned authority to control Carpenter's transactions by either limiting them or proscribing them, but did neither. Dean Witter chose to assert no control over these transactions, the order for each one of which its branch manager was required to individually initial.

A broker-dealer may not choose to look the other way, when the statute charges it with the duty to protect public investors by the exercise of caution and to look for signs of machinations by its own unscrupulous employees. (App. 16). This was a glaring case of "look the other way supervision". The controls Dean Witter published in its manuals were worthless unless persons in control were constantly vigilant for signs that employees might be flaunting them. This is not an instance in which the control person was unable to require compliance with internal standards. The purchases in the Carpenter account of 97,000 options contracts were as integral to the "transactions" (i.e., the Ponzi scheme) as the lies about municipal bonds were. Had Dean Witter made any attempt to oversee or scrutinize the Carpenter account's unexplained and unexplainable trading activity, the Ponzi scheme would have been shut down long before Plaintiffs were defrauded. In this case, control persons at all levels looked the other way. The Court of Appeals correctly concluded that the jury properly determined the Kenning-Carpenter scheme should not have eluded its claimed controls for so long a time if anything approaching vigorous enforcement had been exercised. (App. 16).

Dean Witter's "purely personal transactions" claim is based solely on the manner in which Kenning and Carpenter confirmed investments in what Plaintiffs (and all other fraud victims) believed were municipal bonds. Kenning had told everyone that the purchases of municipal bonds in the Dean Witter bond program could only be made through the Dean Witter account of the selected employees. (App. 5). He confirmed the date and amount invested, the date of maturity, and the promised return on promissory note forms. As the court of appeals recognized, those notes were " . . . little more than confirmations of the pretended municipal bond investments, or just lulling receipts for the money supposedly being invested by the victims in municipal bonds through the Dean Witter trading account." (App. 18). The securities transactions with Plaintiffs were not in "personal notes"; they were for the purchase of municipal bonds. (App. 19). No one purchases promissory notes as personal transactions from salespersons registered by broker-dealers. "The return Harrison was expecting to receive was from the municipal bonds, not the promissory notes." (App. 19). That plaintiffs relied upon the municipal bond representations is unquestioned.

The only case cited by Dean Witter as a reason for granting the writ has nothing to do with any issue presented in the petition. *Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439 (1994).[3]

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[3] Dean Witter never suggested at any time through the decision by the Seventh Circuit that *Central Bank* was related to this case. Reference to Central Bank by Dean Witter first

That opinion deals only with the issue of whether an implied private right of action based on a violation of Section 10(b) and SEC Rule 10b-5 also implied liability for aiding and abetting such violations. Neither the *Central Bank* holding nor its analysis bears any relationship to the private right of action **expressly** provided by Section 20(a) of the Act, enabling recovery of damages from control persons.

Central Bank neither changed nor clarified any element of Section 20(a). Liability thereunder requires no attempt to infer what the 73rd Congress, or any other Congress, would have required to satisfy the express private right of action which is Section 20(a). Congress had no trouble in expressly spelling out what the statute requires. *Central Bank* is irrelevant to any issue decided in this case in that it has nothing to do with proving control, and makes no change in the proof required to show reasonable reliance as an element of the predicate violation by Kenning and Carpenter. A jury, the district court, and the Court of Appeals each considered ample evidence to conclude the reliance was justified and reasonable in these circumstances.

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surfaces in the Petition for Rehearing filed April 3, 1996. This Court's *Central Bank* opinion was published five months before the *Harrison* trial commenced in the district court. Dean Witter made no reference to it in the district court before trial, or in its post trial briefs, nor was *Central Bank* cited in either of its briefs filed before the Seventh Circuit Court of Appeals affirmed the district court.

II. THE OPINIONS BELOW SUGGEST NO ENLARGEMENT OF LIABILITY BASED ON SECTION 10(b).

The opinion below suggests no enlargement in any respect of liability based on Section 10(b) of the Securities Exchange Act of 1934. There can be no question that controlled persons (Kenning and Carpenter) were liable to plaintiffs because they violated Section 10(b).

> **There is no dispute that Harrison was defrauded by John Kenning, a vice president of Dean Witter, and by John Carpenter, a registered salesperson for Dean Witter.** (App. 3).

Section 20(a) requires only a predicate showing that a controlled person was "liable under any provision of this title or any rule or regulation thereunder". Dean Witter admitted every element of a Rule 10b-5 violation by a controlled person, except for reasonable reliance on the representations of the controlled person. The jury instruction on proof required to establish reasonable reliance was drafted by Dean Witter and, of course, is not attacked. (Supp. 107).

Cases affirming control person liability based on Section 20(a) commonly begin with a violation by the controlled person of Rule 10b-5. Payment for investments by checks made out to the registered salesperson instead of the broker-dealer was consistent with reasonable reliance necessary to support the predicate violation in *Hollinger*, supra. Purchasing real estate interests from persons having no relationship with the broker-dealer was consistent with reasonable reliance on representations made by the controlled person in *Hunt v. Miller*, 908 F.2d 1210, 1215

(4th Cir. 1990). Extending millions of dollars in credit to out-of-state persons with whom plaintiff had not previously dealt for the purpose of enabling the borrowers to purchase stock, done in reliance on the statements of a controlled person who was engaged in a conspiracy to manipulate the price of such stock, did not preclude a showing of reliance necessary to establish the predicate violation to Section 20(a) liability. *Paul F. Newton & Co.*, 630 F.2d at 1122.

There is no basis for the assertion that Dean Witter was found liable because Plaintiffs proved "reliance on the principal". (P. 13-14). Plaintiffs relied on the representations of a controlled person, which is the only reliance required by Section 20(a). Harrison's reliance was on the representation that his investment funds were purchasing municipal bonds in the program Kenning described. The justifiability of such reliance turns on whether Plaintiffs had reason to know the funds were being diverted to purchase index options or to purposes other than bond purchases. Harrison had no such reason to know, and the jury so found.

As the Seventh Circuit correctly pointed out, such reliance under the 1934 Act involves considerations different from apparent authority under agency law. The wrong here was the intentional and knowing misrepresentation of material facts by a controlled person. The function of reliance in a Rule 10b-5 cause of action has been recognized by this Court as providing the requisite causal connection between a fraud perpetrator's misrepresentation and a victim's injury. *Basic Inc. v. Levinson*, 485 U.S. 224, 243, 108 S.Ct. 978, 989 (1988).

There can be no doubt about reliance. Dean Witter stipulated to the fact that Harrison had invested more than $4 million in numerous transactions. (Supp. 10). There was no dispute that each investment was made after a separate discussion with the controlled person. The investments were believed to be in municipal bonds purchased in a program Kenning presented as, and Harrison believed was, sponsored by Dean Witter and retained the relative safety and tax benefits of municipal bonds but offered a higher rate of return. (App. 19). Kenning plausibly explained that Dean Witter chose these controlled persons as eligible for the program because of their standing within Dean Witter and their high production, which benefited the broker-dealer. (App. 4).

Whether the undeniable reliance by Plaintiffs was "reasonable" was for the jury to decide. It heard evidence that the municipal bond representations were made by a vice president, working out of an office Dean Witter provided and which Harrison was shown. (App. 20). The controlled persons were provided with business cards; from Dean Witter's municipal bond data bases, the controlled persons obtained municipal bond listings which enabled Kenning to identify for Harrison the issuer, coupon and maturity date of genuine municipal bonds; on one occasion (at Harrison's request) Kenning furnished him with a list of actual bonds Kenning claimed were then owned by Harrison. (Supp. 25, 52, 78). The Harrison phone calls (40 to 50) to Kenning at the Dean Witter office and the "Dean Witter" response by the answering operator are described above. (App. 8; Br. in Opp. 5). The fact that Harrison was only one of more than 100 people who

placed similar reliance on Kenning surely adds support to a finding his reliance was that of a reasonable person.

Plaintiffs agree that reliance is an essential element of a Section 10(b) violation, as did both courts below. Plaintiffs were required to prove justifiable reliance as an element of the *controlled persons'* liability, and the jury found it had sustained its burden of proof. There is no suggestion that reasonable reliance on any act or omission of the control person is any part of the proof required to establish liability based on Section 20(a). The jury finding of reasonable reliance, and its affirmance on appeal, implies no expansion whatsoever of liability based on Section 10(b).

CONCLUSION

The decision of the Court of Appeals is not, and is not claimed to be, in conflict with any other circuit, nor to represent a departure from the accepted and usual course of judicial proceedings. Both Congressional intent and consistent judicial application of Sections 20(a) and 10(b) are in harmony with the Seventh Circuit's opinion here. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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